88- 1827

Supreme Court, U.S.
FILED
APR 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

Robert A. Bonser and
Cedar Waters Village, Inc.,
Petitioners,

v.

Town of Nottingham, New Hampshire,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

Robert A. Bonser, Pro Se
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and

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April 1989

32 pp

QUESTIONS PRESENTED

1. Whether in a state equity case, Fourteenth Amendment due process is offended, where the trial justice knows that he is related by blood to a party but refuses to disqualify himself as required by the Code of Judicial Conduct, adopted as law in New Hampshire, and the State Supreme Court disqualifies him prospectively but will not vacate his past orders complained of by Petitioners which were entered prior to their written complaint, such that this judge's orders in this case are either void, or voidable on motion, in this Court.

2. Whether the judicial disqualification found by the State court in this case is mandatory on the trial judge such that it cannot be waived as a matter of due process of law under said Fourteenth Amendment

to the Constitution of the United States.

3. Whether on the facts of this case Petitioners ever knowingly, intelligently or voluntarily abandoned or relinquished a known right or privilege to have a disqualified judge sit in their case, as a matter of federal law governing waiver of fundamental federal constitutional rights.

THE PARTIES

The parties are the Petitioners, Robert A. Bonser, and the New Hampshire corporation of which he is president, Cedar Waters Village, Inc., along with the Respondent, Town of Nottingham, a political subdivision of the State of New Hampshire, as set forth in the caption of this case in this Court.

Corporate Petitioner, Cedar Waters Village, Inc., has no parent companies, subsidiaries of any kind, nor any affiliates, within the meaning of Revised Rule 28.1, Rules of the Supreme Court of the United States.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

Petitioners, Robert A. Bonser and Cedar Waters Village, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of New Hampshire entered in the above-entitled cause on December 9, 1988. This order is reproduced in the Appendix to this Petition.

OPINION BELOW

The prior opinions of the New Hampshire Supreme Court pertinent to this Petition and the judgment under review, was a two-page memorandum order dated March 3, 1988, and two one-page memorandum orders dated April, 22, 1988, in the State cases captioned Town of Nottingham v. Robert A. Bonser and Cedar

Waters Village, Inc., and numbered 86-005/ 86-255 & 87-457, respectively. These orders are reproduced in the Appendix to this Petition.

The judgment in this case consisted of the opinion and decision entered by the New Hampshire Supreme Court and reported in Town of Nottingham v. Bonser, ____N.H.____, 552 A.2d 58 (December 9, 1988), which became final when no motions for rehearing or reconsideration were filed within ten days of December 9, 1988.

A Report of the New Hampshire Supreme Court (Bois, J., Ret.), sitting as a master to find facts, dated February 19, 1988, upon which the aforesaid memorandum orders relied, is also included in the Appendix to this Petition.

JURISDICTION

The judgment of the Supreme Court of New Hampshire awarding Respondent equitable relief and attorneys fees in the approximate amount of $13,873.00 was entered on December 9, 1988.

By Order of this Court (Brennan, J.) the time for filing this Petition, absent further extension, was enlarged to include April 8, 1989.

This Petition is timely filed.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1257(3) and 2101(c), and Revised Rules 20.2 and 28.2, Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and Canon 3(C) of the Code of Judicial Conduct, adopted with the full force and effect of law in New Hampshire as Canon 3(C), Rule 38, New Hampshire Supreme Court Rules. Canon 3(C), governing disqualification of judges, is substantially equivalent to the provisions of 28 U.S.C. § 455 governing disqualification of Federal judges.

The New Hampshire Canon is set forth in the Appendix to this Petition.

The Code of Judicial Conduct, promulgated by the New Hampshire Supreme Court, has the force of statute law pursuant to the New Hampshire Constitution, Part II, Article 73-a.

The Code of Judicial Conduct has also been adopted by every other State jurisdiction in America.

STATEMENT OF THE CASE

A. SUMMARY OF PERTINENT FACTS

The basic facts necessary for a determination of the questions presented in this Petition are not in dispute.[1]

In an equity case involving a zoning controversy in the Town of Nottingham, N.H. over placement of low-income manufactured housing sought to be provided by Petitioners, the trial judge newly assigned to the Superior Court case in 1985 was, and knew he was, related by blood to the corporate secretary (his maternal uncle) of a party,

---

1. The facts relied on herein were either admitted by the Respondent or trial judge, found by the State Supreme Court, and/or alleged by Petitioners and not disputed or further litigated below.

Cedar Waters Village, Inc. As such the judge was absolutely and per se disqualified to sit in the proceedings as a matter of law under Canon 3 (C)(1)(d)(i), Code of Judicial Conduct, Rule 38, New Hampshire Supreme Court Rules.

Moreover, the judge was not on speaking terms with his uncle, so hostile were the relations.[2]

The Petitioners had standing to complain about the judge's sitting in these circumstances, since his "[r]elationship or affinity to either party, though only a stockholder in a corporation...is a cause of recusation by either" party as a matter of law, and the "disqualifi[cation]" to

---

2. The trial judge claimed privilege from testifying at an evidentiary hearing, was excused by the master, and the Supreme Court did not reach the issue of actual bias.

sit, "the disibility result[s] from the relationship." Moses v. Julian, 45 N.H. 52, 55-56 (1863), reaffirmed in State ex rel. Thomson v. State Board of Parole, 115 N.H. 414, 421 (1975).

Petitioners never waived their rights to a qualified judge. As soon as they became aware of the legal grounds for the trial judge's disqualification, they filed a motion to recuse, which the judge first ignored, and then denied, after rendering decisions on substantial matters in the meanwhile. Petitioners had appeared pro se up to the point of the motions to recuse.

B. PROCEEDINGS BELOW

In pending appeals from orders issued by the trial judge, Petitioners filed motions for summary reversal, raising the trial judge's disqualification for relationship to a party and actual bias toward Petition-

ers and their corporate secretary, the judge's uncle.

The Supreme Court of New Hampshire found the judge disqualified, recused him, and vacated his orders issued after Petitioners' motions for recusal. The State Court found that Petitioners had waived the issue of the judge's disqualification by not raising it earlier, when they knew of the blood relation (but not that these facts constituted a legal ground of recusation and per se disqualification).

The State Supreme Court later upheld the prior orders of the trial justice, which gave substantial equitable and monetary relief to Respondent in the form of an injunction, civil contempt findings, and award of attorneys fees and costs.

This petition for review followed.

REASONS FOR GRANTING THE WRIT

A. THIS CASE PROVIDES THIS COURT WITH THE OPPORTUNITY TO CLARIFY AND EXPAND UPON ITS DECISION IN LILJEBERG V. HEALTH SERVICES ACQUISITION CORP, 108 S.Ct. 2194 (1988).

In Liljeberg the Court last Term upheld the Fifth Circuit Court of Appeals disqualification of a trial judge who "certainly should have known" of the facts constituting conflict of interest and mandating recusal under 28 U.S.C. § 455 (various subsections), and vacated his prior orders even though first raised by the petitioners many months after the judgment became final. Id., 108 S.Ct., at 2197-8, 2203, 2206.

This Court opined that "advancement of the purpose of the provision [of the Code

of Judicial Conduct governing disqualification] - to promote public confidence in the integrity of judicial process" required that the "provision...be applied retroactively" to "rectify [the] oversight" on the judge's part in not recusing himself in the first place, "reopening of closed litigation," and "vacating" the judge's "judgments." Id. at 2202-03.

Important to the Court was the time-honored proposition that "to perform its high function in the best way 'justice must satisfy the appearence of justice.'" Id., at 2204, quoting In re Murchison, 349 U.S. 133, 136 (1955). "The problem [] is that people who have not served on the bench are often too willing to indulge suspicions and doubts concerning the integrity of judges." Id., at 2204-05 & n. 12. "[T]his concern has constitutional dimensions," where, as here, actual bias is

alleged and not denied. Ibid, at n. 12, citing Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986). "The Due Process Clause [of the Fourteenth Amendment] 'may sometimes bar trial judges who have no actual bias" but "appear" to have a conflict of interest which "would offer a possible temptation to the average [judge] ...[to] lead him not to hold the balance nice, clear and true.'" Liljeber, ibid, n. 12 (citations omitted)(elipses and brackets in original).

In Liljeberg, this Court set forth standards for determing when retroactive vacating of a disqualified judge's past orders is appropriate. Among the factors to be considered is whether Petitioners "ma[de] a timely request for relief," id. at 2206, i.e., whether "the motion to vacate was filed as promptly as possible," id., at 2198. In this regard, the Court

held that it is important to consider whether the judge made a "full disclosure" of facts he knew or should have known might require his recusal, id., at 2205.

In your Petitioners' case, it is not disputed and the record plainly shows that the trial judge made no disclosure whatsoever of the grounds he should have known required his recusal.

Petitioners' reason for any "delay in filing a motion for recusal" while the trial proceedings were in progress was that "[they] did not know of the rule that [they] interpret as requiring disqualification until shortly before [they] filed such a motion." Report of N.H. Supreme Court Master (Bois,J., Ret.), post, at A-2 — A-17 . It is not contested that Petitioners did file the motions for recusal before the orders complained of became

"final," id., at 2198, and thereafter brought the claims to the N.H. Supreme Court in pending appeals, cf., id., at 2204 n. 11, both held to be "reasonable" time periods in this regard.

Petitioners, being pro se at all times relevant to the foregoing, brought their motions for recusal "as promptly as possible," i.e., within a few days of learning of the legal ground for recusal involved, and promptly made the motion for summary reversal in the State Supreme Court soon thereafter. As in Liljeberg, the trial judge here "den[ied] the motions" to recuse, cf., id., at 2206, but the appellate court found the judge disqualified, cf., id., at 2198, 2202.

This Court concluded in Liljeberg that any "delay is attributable to [the] Judge-['s] inexcusable failure to disqualify him-

self...or even disclose [his] interest in the case at [an earlier] time," id., at 2207, and the "guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact," ibid, quoting Public utilities Comm'n v. Pollak, 343 U.S. 451, 466-467 (1952) (Frankfurter, J., in chambers).

Petitioners respectfully submit that the decision of the Supreme Court of New Hampshire in this matter contravenes due process of law[3] and is in conflict with the teachings of this Court in Liljeberg, for the reasons aforesaid.

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3. Where every federal and state jurisdiction in America has adopted these provisions of the Code of Judicial Conduct, they have now become part of the fabric of the ordered liberty deemed fundamental to our system of justice and hence part of due process of law.

B. THE NEW HAMPSHIRE SUPREME COURT HAS DECIDED THE FEDERAL QUESTION OF WAIVER OF JUDICIAL QUALIFICATION IN A WAY IN CONFLICT WITH THE DECISIONS OF SEVERAL FEDERAL COURTS OF APPEALS

The State Court held that Petitioners had "waived" their right to challenge the disqualified judge's prior ruling because they kn[ew] of the facts but file[d] no timely motion for recusal." Order in No. 86-005/86-255, dated March 3, 1988, post, at A-21 — A-25 . The New Hampshire Court overlooked the finding of its Master, aforecited, that Petitioners filed the motions to recuse as soon as they knew the legal basis for the motion, being pro se at the time.

The Courts of Appeals have found that the provisions of disqualification here at issue are "mandatory," "automatically" require "sua sponte" recusal by a trial judge, are per se to be followed, and the

issue may be raised on appeal , never having been presented to the trial court, so important is the Code of Judicial Conduct to the appearence of judicial integrity. See especially, SCA Services v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977) ("rights to enforce" code disqualification cannot be "waived;" "no duty on the parties to seek disqualification;" no "time limits within which disqualification must be sought"). Compare, Liljeberg, 108 S. Ct., at 2205 (judge was "under a duty to recuse himself before he entered judgment") (emphasis in original). See also, Moody v. Simmons, 858 F.2d 137, 142-3 (3rd Cir.1988) ("a judge is automatically recused upon the existence of certian familial and/or financial relationships," as distinct from the more general claims of "appearence" of partiality under the Code of Judicial Conduct; "to the extent that" the grounds

"mandated recusal after the order, they must also mandate recusal before"); Potashnick v. Port City Const. Co., 609 F.2d 1101, 1114- 1115 (5th Cir.1980)("kinship" requires "automatic disqualification" which "cannot be waived;" in dicta: "no duty on the parties to seek disqualification, nor any time limits within which disqualification must be sought;" question not reached: "whether reversal on this ground alone would be foreclosed by Port City's failure to raise the issue of disqualification"); Easley v. Univ. of Michigan Bd. of Regents, 853 f.2d 1351, 1356-1358 (6th Cir.1988)(Code section is "self-executing, requiring the judge to disqualify himself for personal bias even in the abscence of a party complaint...recusal is mandated...sua sponte;" issue can "be[] raised initially on appeal," citing Liljeberg, Noli v. C.I.R., 860 F.2d 1521 (9th Cir.1988)("Failure to move for

recusal at the trial level [] does not preclude raising on appeal the issue or recusal under" the Code of Judicial Conduct, but "if no motion is made to the judge...a party will bear a greater burden on appeal in demostrating that the judege...[erred] in failing to...recus[e] under" the Code; question of trial judge's actual bias or partiality heard by Court of Appeals, id., at 1527).

In your Petitioners' case, they bore this additional burden because their claimed grounds for recusal were not rebutted, and the appellate court in New Hampshire actually disqualified the trial judge for cause.

For all of the foregoing reasons, it was error of constitutional magnitude for the Supreme Court of New Hampshire to rule that Petitioners "waived" their fundamental

right to an impartial judge.

C. THE NEW HAMPSHIRE SUPREME COURT HAS DECIDED THE FEDERAL QUESTION OF WAIVER OF FEDERAL CONSTITUTIONAL RIGHTS IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The right to an impartial, qualified judge, free of disabling conflicts of interest and actual bias, is unquestionably a "concern [that] has constitutional dimension" under the "Due Process Clause." Liljeberg, supra, 108 S.Ct., at 2205 n. 12.

Under applicable cases of this Court, "[t]he question of an effective waiver of a federal constitutional right is of course governed by federal standards." Boykin v. Alabama, 89 U.S. 238, 244 (1969). These standards apply "in the civil no less than in the criminal area, [and] courts endulge every reasonable presumption against waiver."

Fuentes v. Shevin, 407 U.S. 67, 94-95 & n. 31 (1972).

The federal standard for finding a waiver of federal due process rights, make it "incumbent upon the State to [find] 'an intentional relinquishment or abandonment of a known right or privilege,'" and this "waiver" must be found to have been "voluntarily, knowingly and intelligently" made. Brewer v. Williams, 430 U.S. 387, 403-404 (1977), quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938), also relied on in Fuentes v. Shevin, supra.

The New Hampshire Supreme Court made no findings of fact sufficient to rule that Petitioners "waived" their due process right to a qualified, impartial judge. See, Order of March 3, 1988, post, but merely concluded that their "inaction [wa]s tantamount to waiver." Id. The State Supreme

Court master found, conversely, that Petitioners' delay in filing a motion for recusal" was "explain[ed]" by the fact that they "did not know of the rule that [they] interpret[] as requiring disqualification until shortly before [they] filed such a motion." See, Report of February 19, 1988, post.

Clearly, under the federal standards of waiver, in these circumstances, Petitioners did not intentionally abandon or relinquish a known right or privilege, and such knowledge cannot be imputed to them where they were pro se laymen. The trial judge, however, was an experienced lawyer and jurist of many years — it is not disputed — and plainly should have recused himself under the Code of Judicial Conduct.

CONCLUSION

For all of the foregoing reasons, the judgement of the Supreme Court of New Hampshire should be reversed, and the orders of the trial judge vacated, with the cause remanded for retrial before another judge (who has already been assigned by the New Hampshire Superior Court).

In the alternative, the cause should be remanded for further evidentiary hearing on whether Petitioners "waived" their rights to an impartial and qualified judge in the circumstances of this case, under federal standards of waiver discussed above.

Respectfully submitted,

April , 1989

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April , 1989

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AFFIDAVIT OF FILING AND SERVICE

I hereby declare under penalty of perjury that I am a member of the Bar of this Court, and that I filed the requisite number of copies of this Petition with the Court by mailing the same, first class, postage pre-paid, from New Hampshire, on April , 1989.

At the same time, I mailed the requisite number of copies hereof to opposing

counsel, Mark S. Gearreald, Esq., P.O. Box 278, Exeter, N.H. 03833, and a curtesy copy to the New Hampshire Supreme Court, Noble Drive, Concord, N.H. 03301, also by first class mail.

_____
Thomas C. Dunnington

STATE OF NEW HAMPSHIRE

, SS.

Then came the above-named Thomas C. Dunnington, Jr., personally known to me, and upon his oath declared that the foregoing affidavit of filing and service signed by him was true and correct, under penalty of perjury.

April , 1989

_____
NOTARY PUBLIC/JUSTICE
OF THE PEACE

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APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF NEW HAMPSHIRE

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April 1989

Appendix to

Petition For Writ Of Certiorari To The

Supreme Court Of New Hampshire

THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham
Nos. 86-005
86-255

TOWN OF NOTTINGHAM

v.

ROBERT A. BONSER and
CEDAR WATERS VILLAGE, INC.

February 19, 1988

Engle, Morse, Pudloski and Gearreald, of Exeter (Mark S. Gearreald), for the Town of Nottingham.

The State of New Hampshire, on behalf of Superior Court Justice Joseph P. Nadeau (Stephen E. Merrill, Attorney Gemeral, and Douglas N. Jones, Assistant Attorney General.

Robert A. Bonser, of Nottingham, pro se and for Cedar Waters Village, Inc.

Thomas C. Dunnington, Jr., of Dover, for Cedar Waters Village, Inc.

REPORT

The court by its order of December 23, 1987, as amended by its further order of January 7, 1988, referred two motions for an evidentiary hearing and findings of fact. These motions, both filed by the defendants, are a motion for reconsideration and a motion for summary reversal.

On the motion for reconsideration, the questions referred by the court are:

1. Whether the defendants and/or their counsel received the supreme court's order of June 25, 1987, in No. 86-255 requiring payment of the estimated costs of preparing transcripts on or before July 15, 1987; and

2. Whether the amount was timely paid.

On the motion for summary reversal, the questions referred are:

1. The relationship between Justice Nadeau and attorney Joseph E. Michael;

2. Whether Justice Nadeau and the

parties to this action knew of the relationship during the pendency of the action;

3. Whether Attorney Michael has been an officer or director of Cedar Waters Village, Inc. during the pendency of this action.

The amendment to the order bifurcated the enquiry so that the issue's of Justice Nadeau's knowledge of Attorney Michael's position in the corporate defendant and the dates the justice may have acquired such, knowledge, originally questions referred, were eliminated from the hearing shceduled for January 11, 1988. Pending receipt of this report, the court reserved a decision as to whether further hearing is necessary to enquire into such knowledge as Justice Nadeau may have had. Any request or objection to testimony required from Justice Nadeau was left to be ruled upon by the hearing Justice.

Hearing was held at the New Hampshire

Supreme Court on January 11 and 12, 1988. All parties were present and represented by counsel except Robert A. Bonser, who was pro se.

I. Motion for Reconsideration

Case no. 86-005, Town of Nottingham (Town) v. Cedar Waters Village, Inc. & a. (Cedar) is captioned in this matter as a result of this Court's consolidation order in case no 86-255, Town of Nottingham (Town) v. Robert A. Bonser & a. (Bonser), dated June 25, 1987. See defendants' exhibit B prodeuced by Cedar. Case no. 86-005 was accepted by this Court in its order dated May 5, 1986. It is found from evidence presented, that the estimated cost of preparing transcripts in the amount of one hundred ($100.00) dollars was timely paid in that case.

The order of this court, dated June 25, 1987, in 86-255 is the one particularly in

question. Mr. Bonser, by affidavits and sworn testimony, and Mr. Dunnington, by affidavits and representations made in open court, categorically deny ever receiving such a document (see affidavits attached to motion for reconsideration and reply to objection to motion for reconsideration).

There is evidence that the clerk of the Rockingham County Superior Court and Mr. Gearreald, counsel for the town, two addressees copied in the order, timely received it.

Mr. Bonser, his wife Mary, and daughter-in-law Mary Leona Parks Bonser have all testified that they are involved in some fashion with receipt and processing of the mail which is deposited by carrier in a mail box situated in front of the Bonser residence in Nottingham. Both Mr. Bonser and his wife Mary deny ever receiving the order in queston. The daughter-in-law testified that additionally she keeps duplicated of all pleadings

and denies ever having seen such an order. Opposing counsel questioned the witnesses' credibility in rigorous cross-examination.

Mr. Dunnington, with the parties acquiescence and waiver as to calling him as a witness, represented to the court that when he first received the court's order of July 28, 1987, wherein the appeal is deemed waived (defendant's exhibit C produced by Cedar), he could not remember receiving the order dated June 25, 1987, and when a search of his file proved fruitless, he prepared the first affidavit attached to the motion for reconsideration.

A letter to Mr. Bonser brought him and his daughter-in-law to the office and after discussion triggered off a search by the Bonsers. Mr. Dunnington then again thoroughly searched his office even going through loose papers. He consulted with both his secretary and a former secretary no longer

employed by him, as well as with his wife, who is also his office manager. He reaffirmed the statement contained in a second affidavit attached to the reply to objection to motion for reconsideration wherein he states in part, "I am certain that I did not receive said order by timely mailing from the Supreme Court, as I am of anything in my practice."

Mr. Bonser and his daughter-in-law testified that within a couple of days of receipt of the July 28, 1987, order, they had gone to the clerk's office of the Rockingham County Superior Court. They obtained a copy of the order of June 25, 1987, regarding transcript fee. That notice is flawed in that it refers to cases 86-005/ 86-266. Going through their case jacket, they discovered a copy of a letter from the clerk of that court to the supreme court indicating that the transcript deposit "has been been received. Plaintiff's exhibit 4. They

testified that they were confused, and they then went to the clerk's office in the supreme court where they spoke with Donna Craig. Looking up case no. 86-266, Miss Craig discovered that the defendants were not involved in that matter and its inclusion in the notice was apparently an error.

Miss Craig accessed no. 86-255 in the computer and testified that the filing fee had been paid but that the transcript fee had not been paid. Because of the so-called "has been been paid" letter shown to her by the Bonsers, she contacted the Rockingham County Superior Court and was informed the fee had not been paid. She so advised the Bonser who left.

The supreme court's records contain a letter dated July 16, 1987, from the Rockingham County Superior Court signed by its clerk and received on July 17, 1987. Plaintiffs' exhibit no. 5. This letter

indicated a "whited" out word and a "not" substituted so that it read "has not been received." The matter was cleared up by testimony from the superior court clerk's office that, as originally drafted, the letter contained a typographical error indicating the deposit "has been been received." The original letter sent to the supreme court was corrected, in different type, to note said deposit "has not been received." Inadvertently, the superior court's file copy was not corrected, and Mr. Bonser got an erroneous copy while the clerk was on vacation. See affidavit attached to town's objection to motion for reconsideration.

The Bonsers testified that at first they thought someone had paid the transcript fee. Upon reviewing their records, they realized the fee had not been paid and on August 25, 1987, posted by certified mail a letter dated August 24, 1987 enclosing a

check for the proper amount. Plaintiff exhibit no. 1.

Finding

Notwithstanding the fact that the accuracy of some of the defendants' statements contained in the pleadings and affidavits are suspect, the court is convinced that they did not receive the notice of order in question. This finding is further reinforced by Mr. Dunnington's unchallenged affidavits and representations made in open court.

The court finds that

1. The defendants and/or their counsel did not timely receive this court's order of June 25, 1987, in case no. 86-255 requiring payment of the estimated cost of preparing the transcript on or before JUly 15, 1987, and

2. because of (1) above, the amount was not timely paid.

II. Motion for Summary Reversal

The questions posed in the motion for summary reversal may summarily be disposed of.

1. The relationship between Justice Nadeau (nephew) and Attorney Joseph A. Michael (uncle) is admitted in the pleadings and by Joseph A. Michael upon his direct testimony. It is found that such a relationship did and does in fact exist.

2. Justice Nadeau obviously must have known of this familial relationship from an early age ... well before the commencement of this litigation in 1981, and it is so found.

Mr. Bonser testified about his personal and business relationship with Attorney Michael and that he knew for many years of the familial relationship between Justice Nadeau and Joseph E. Michael. He explains the delay in filing a motion for recusal in

that he did not know of the rule that he interprets as requiring disqualification until shortly before he filed such a motion.

3. Attorney Michael testified, and it is found, that he incorporated the defendant corporation in May of 1961. He has always had and still has custody of the records of said corporation and to this day considers himself to be secretary/clerk of the corporation. For purposes of incorporation he very briefly held one share of stock in the corporation but now owns no stock. He has never been and is not presently a director, nor does he have any interest in said corporation. The records of the corporation, which he produced under subpoena, confirm his testimony and indicate that the last stockholders' corporate meeting was held on May 3, 1982, at which time he was listed and acted as secretary.

He further testified, and it is so found, that he has "never ever" had any

ex-parte communications with Justice Nadeau relative to the defendants' cases. He has advised the defendants that he would never have undertaken, and never will undertake, their representation in their present cases because of his relationship with Justice Nadeau.

Justice Nadeau had been subpoenaed by Mr. Bonser. He appeared and was called.

Before the Justice was allowed to take the stand the court interrogated Mr. Bonser as to his purpose, He stated that he:

1. wants to ask Justice Nadeau if he is familiar with Supreme Court Rule 38 C(1)(d);

2. would like to know which church Justice Nadeau and Attorney Michael belong to;

3. show that Attorney Michael belongs to the same bar association as Justice

Nadeau and question their joint attendance at bar association meeting;

4. wants to ask Justice Nadeau why on May 22, 1987, did he still hear the case after he saw Mr. Michaels' signature on paperwork prepared for dissolution of the corporation; and

5. wants to impeach Attorney Michaels' testimony by queries to be posed to Justice Nadeau.

The court asked Mr. Bonser to justify his request that Justice Nadeau take the stand without citing what the court believed to be extaneous and immaterial matters. The court explained its duty under the charge from the supreme court. Attorney Dunnington stated that he had advised his client that he was opposed to the issuance of the subpoena and that he would not be heard in argument. The Attorney General was permitted to and did address the court.

Mr. Bonser was given a last opportunity to present other questions or arguments to the court. He stated that his whole argument from the very beginning was that he has been denied due process in the form of a jury trial. When asked if he had a final statement, he replied, "Yes, give me a jury trial." He was advised that such was beyond the court's ability, as its authority was limited by the charge imposed on it. No further arguments or statements were offered by any of the parties.

The Court suggested that it would entertain a motion to bring forward Justice Nadeau's motion to quash the subpoena for reconsideration. The Attorney General so moved, and the court granted the motion.

It was agreed that all parties would have until Monday, January 18, 1988, at 4:30 p.m. to file written arguments. All parties did so, and they are filed with

the supreme court. It is noted that Attorney Dunnington did not join in the closing statements and that Robert A. Bonser signed same as pro se and as President of Cedar Waters Village, Inc.

s/

Bois, J. (Retired)
Supreme Court of
New Hampshire

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 86-005/86-255 Town of Nottingham v. Cedar Waters Village, Inc. and Robert A. Bonser the court upon April 22, 1988 made the following order:

Plaintiff's motion for issuance of final judgment as to defendant Cedar Waters Village, Inc. (In #86-005 only) is granted.

Robert A. Bonser's motion for rehearing of order of March 3, 1988, is denied.

The court notes that the further supplement to notice of appeal filed on July 1, 1987, is no longer moot since the court has vacated its order of July 28, 1987. The superior court orders of June 1, 1987, on Plaintiff's motions for attachment, further award of attorney's fees, and further contempt are vacated for the reasons stated in our order of this date in 87-457, Town of Nottingham v. Robert A. Bonser & a. We order

that those motions be resubmitted forthwith to the justice now specially assigned to this and related cases.

Transcript having been filed in 86-255, the brief of defendant Robert A. Bonser in 86-005 and of Robert A. Bonser and Cedar Waters Village, inc. on the questions accepted in 86-255 shall be filed on or before June 6, 1988; plaintiff's brief shall be filed on or before July 21, 1988; hearing September/October 1988 session.

Distribution:

Hon. Maurice P. Bois
Hon. Richard P. Dunfey
Hon. Joseph P. Nadeau
Mark S. Cearreald, Esquire
Mr. Robert A. Bonser
Thomas C. Dunnington, Esquire
Rockingham County Superior Court
Hon. Kenneth McHugh
File

Ralph H. Wood,

Clerk

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 87-457 Town of Nottingham V. Robert A. Bonser and Cedar Waters Village, Inc. the court upon April 22, 1988 made the following order:

Our order of February 23, 1988, is vacated and the motion for summary reversal is granted.

Although our order of March 3, 1988, in Town of Nottingham v. Cedar Waters Village, Inc. and Robert Bonser (No.'s 86-005/86-255) holds that Mr. Bonser's failure to invoke the known relationship between the judge and an official of the corporate Defendant, as a ground for the judge's recusal, operated as a waiver of any claim for retroactive recusal on that ground, we did not find any waiver as to prospective recusal. The Individual defendant is therefore entitled to contest the denial of the recusal motion insofar as it

was based on the judge's family relationship, and insofar as the judge took action in the case after the recusal motion was filed. We summarily reverse the denial of the motion to recuse based on family relationship and order that recusal be deemed to have been entered as of May 8, 1987. Accordingly, we now vacate the October 8, 1987, denial of the motion to dismiss and order that the motion be resubmitted forthwith to the justice now specially assigned to this and related cases.

Distribution:

Rockingham County Superior Court
Mark S. Gearreald, Esquire
Douglas N. Jones, Esquire
Thomas C. Dunnington, Jr. Esquire
Mr. Robert A. Bonser
Hon. Joseph Nadeau

Ralph H. Wood,
Clerk

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In case No. 86-005/86255 Town of Nottingham v. Cedar Waters Village, Inc. and Robert A. Bonser the court upon March 3, 1988 made the following order:

The court, having considered the report of Bois, J. (retired), which shall be distributed to the parties with this order, grants defendants' motions for reconsideration and denies their motion for summary reversal.

Regarding the motion for reconsideration, the finding having been made that defendants and/or their counsel did not timely receive the order requiring payment of the estimated cost of preparing the transcript on or before July 15, 1987, the court vacates its order of July 28, 1987, deeming the appeal to have been waived. The defendants having subsequently paid to the Clerk of the Rockingham County Superior Court the

estimated cost of preparing transcripts in the amount of $537.50, the clerk of the trial court shall notify the court reporter to proceed with the transcription and shall notify the clerk of the supreme court that the court reporter has been so notified.

Regarding the motion for summary reversal, Bois, J. has reported that Mr. Bonser testified that he knew for many years of the familial relationship between Justice Nadeau and Attorney Michael. Thus, at the time of Justice Nadeau's participation in these cases, Mr. Bonser was aware of the basis upon which he now seeks Justice Nadeau's disqualification retroactively. Not having raised the issue of disqualification at the trial level, the defendants have waived the issue. See Smith v. Rabb, 95 Ariz. 49, 54, 386 P. 2d 649 (1963); Karrh v. crawford-Sturgeon Ins. Inc., 468 So. 2d 175, 177 (Ala Civ. App 1985).

Although we have written in dictum

that a per se rule of disqualification is required when the trial judge is related to a party, State v. Aubert, 118 N.H. 739, 741 (1978), that rule is not dispositive of the issue raised by defendants' motion. The issue before us is not whether Justice Nadeau was obligated to recuse himself if he knew of his uncle's relationship to the corporate defendant, nor is it whether his recusal would have been mandatory if the defendant had made a timely motion to that effect. The issue , rather, is whether a party who knows of the facts but files no timely motion for recusal thereby waives his right to do so after the litigation has proceeded. Because we hold that such a party's inaction is tantamount to waiver, we need not enquire further.

Nor is a different result required under the case upon which the defendnats place principle reliance in their closing statement submitted to Justice Bois. See

Potashnick v. Port City Const. Co., 609 F.2d 1101 (5th Cir. 1980). In Potashnick, the fifth Circuit found two grounds for disqualification. First, there was a business relationship between the trial judge and plaintiff's counsel, which was known to the judge but not to the defendants. Thus, the defendants could not raise that ground until they became aware of it. Second, the trial judge's father was a member of the law firm representing plaintiff, a fact which was known to defendants who specifically agreed to proceed without requesting disqualification. The Fifth Circuit did not reach the issue of waiver on that ground, holding that the first ground was sufficient for reversal even if waiver were to be found with respect to the second. Id., 609 F.2d at 1115.

Distribution:

Hon. Maurice P. Bois
Hon. Richard P. Dunfey
Hon. Joseph P. Nadeau

Mark S. Gearreald, Esquire
Mr. Robert A. Bonser
Thomas C. Dunnington, Esquire
Douglas Jones, Esquire
Joseph E. Michaels, Jr. Esquire
File

s/
Ralph H. Wood, Clerk

ATTACHEMENT:

Copy of Bois, J. (Retired) Report

APPENDIX

R38 N.H. SUPREME COURT RULES

Code of Judicial Conduct,

Canon 3

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or

as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or is a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

(2) A judge should inform himself about his personal and fiduciary financial

interests, and make a reasonable effort to inform himself about the personal interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the funds;

(ii) an office in an educational,

religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutaul insurance company, of a depositor in a mutual savings association, or a similar propriety interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

D. Remittal of Disqualification.

A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification.

If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Library references

Disqualification of judge by state, in criminal case, for bias or prejudice. 68 ALR3d 509.

Disqualification of judge because of assault or threat against him by party or person associated with party. 25 ALR4th 923.

Waiver or loss of right to disqualify judge by participation in proceeding-modern state criminal cases. 27 ALR4th 597.

Disqualification of judge in state proceedings to punish contempt against or involving himself in open court in his actual presence. 37 ALR4th 1004.

ANNOTATIONS

1. Disqualification

In order for recusal, there must exist bias, or such likelihood of bias, or an appearence of bias that judge is unable to hold balance between vindicating interests of court and interests of accused. State V. Linsky(1977)117 NH 866,379 A2d 813.

Contention by defendants that statements in record by trial judge to effect that he was not pre judging guilt of defendants and that he would reach verdict on evidence actually constituted bias on part of judge, was not valid argument. State v. Linsky (1977) 117 NH 866, 379 A2d 813

That judge had personal knowledge of disputed evidentiary facts, gathered at meeting between court and defendant's counsel just before incident of criminal contempt in question allegedly occurred and from accounts in newspaper and on radio, did not necessarily constitute bias requiring recusal. State v. Linsky (1977) 117 NH 866, 379 A2d 813.

On record as a whole, it could not be held that trial judge in criminal contempt proceeding abused his discretion in refusing to recuse himself or that his refusal deprived defendants of hearing before impartial judge which violated their rights of due process. State v. Linsky (1977) 117 NH 866, 379 A2d 813.

THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham
Nos. 86-005
86-255

TOWN OF NOTTINGHAM

V.

ROBERT A. BONSER AND
CEDAR WATERS VILLAGE, INC.

December 9, 1988

Engel & Gearreald, of Exeter (Mark S. Gearreald on the brief and orally), for the plaintiff.

Thomas C. Dunnington, Jr., of Dover by brief and orally, for Cedar Waters Village, Inc.

Robert A. Bonser, pro se.

Souter, J. The Superior Court (Nadeau, J.) ordered the defendants to reimburse the plaintiff for attorney's fees incurred in seeking to enforce an order enjoining

zoning violations and, in a separate proceedings, held the defendants in civil contempt for violating the original injunction. The defendants have appealed in each instance, although the corporate defendant has defaulted in the appeal from the fee award. We affirm each order.

More than seven years have passed since the events first giving rise to this litigation, which has required frequent and protracted appearences before the superior court, numerous orders by this court, proceedings in the United States District Court and the Court of Appeals for the First Circuit, and the prior appeal and opinion sub nom Bonser v. Courtney, 124 N.H. 796, 481 A.2d 524 (1984), from which we will summarize the facts through the spring of 1984. At all relevant times, the defendant

Cedar Waters Village, Inc. has owned a tract of some 350 acres in the Town of Nottingham, having received the land by conveyance from the defendant Robert A. Bonser and his wife. Bonser is the corporation's principal officer and stockholder.

In 1981, Bonser and the corporation caused or allowed six mobile homes to be placed on the land for residential use in violation of the town's zoing ordinance, which required conformance with regulations of the town planning board. The regulations, in turn, treated the use of the land for mobile home sites as a subdivision, for which the planning board's approval was necessary. Bonser v. Courtney, supra at 800, 481 A.2d at 525. The defendants failed to obtain or even apply for the requisite approvals, because of Bonser's belief that

zoning regulation is a per se unconstitutional limitation on his property rights. Consistently with this position, he and Cedar Waters refused the town's demand for removal of the unapproved mobile homes, whereupon the town petitioned the superior court for an injunction against placing any further mobile homes on the tract and for an order to remove the six already there.

Disposition of the injunction petition was complicated by Bonser's insistence on representation by lay counsel and by his claim of constitutional entitlement to jury trial in the equity proceedings, which led the Superior Court (Dalianis, J.) to offer to empanel an advisory jury to recommend resolution of any disputed issue of fact that Bonser might identify. He identified none, and on June 10, 1982, Contas, J., enjoined the defendants from using the

mobile homes pending compliance with the town's regultions and ordinances no later than September 1, 1982. The injuction provided that if the defendants failed to comply by that date, they would become subject to an order to remove the homes, and upon their failure to do so the town would then be authorized to remove the structures at the defendant's expense. Bonser, supra at 803, 481 A.2d at 527.

The defendant's did nothing, the town apparently declined to exercise the judicially-authorized self-help, and hearings on a further petition brought by the town to require the defendants to take action elicited little more than additional expressions of Bonser's constitutional views. In November, 1982, Wyman, J. found Bonser in civil contempt and, inter alia, levied a fine for each day Bonser should remain so.

In February, 1983, Dalianis, J. affirmed the November order and once again authorized the town to remove the mobile homes if the defendants had not done so by March 31, 1983.

On March 17, 1983, the town petitioned for Bonser's commitment to the county jail for contempt in having refused to pay the accumulating fines. At a hearing before Douglas, J., in April, 1983, the court determined that Bonser had the means to pay the fines for civil contempt, calculated their accrued total at $7,150. and committed him to jail until he should purge himself of the continuing contempt of court. In May, 1983, Bonser refused before Bean, J., to comply with the outstanding orders; and in June, Temple, J., denied his petition for habeas corpus, but released him on bail pending his intended appeal. Bonser, 124

N.H. at 807, 481 A.2d at 530.

This court accepted the appeal and held that Bonser's opportunity to attack the merits of the original injunction of June, 1982, and to litigate his constitutional objection to zoning and demand for jury trial, had been limited to a direct appeal from the 1982 order, which he had not taken. Bonser, 124 N.H. at 810, 481 A.2d at 532. Although the court did entertain Bonser's collateral attack on the contempt finding itself having been tainted by the failure to provide a jury trial, that issue was resolved against him, id., and the habeas appeal was otherwise limited to examining and affirming the trial court's personal and subject matter jurisdiction in the contempt proceeding. Bonser, 124 N.H. at 807-10, 481 A.2d at 530-32.

The court observed that Bonser had no

grounds for pleading ignorance of judicial procedures for directly appealing those issues he had raised during the original injunction proceedings, and which he continued to insist on litigating collaterally. Not only had the superior court expressly advised him and his chosen lay counsel of the steps required to appeal the June 1982 order, but he had had the benefit of his own experience in appealing an earlier zoning action, Town of Nottingham v. Cedar Waters, Inc., 118 N.H. 282, 385 A.2d 851 (1978). Bonser, 124 N.H. at 811, 481 A.2d at 533. The court also took notice of the "veritable avalanche of motions, countermotions, and special appearences" that had been filed by Bonser and his lay counsel.

Much the same language might be used to allude to developments during the more

than four and one-half hears that have now elapsed since the habeas proceeding was concluded. The record before us indicates that the violation continues, the defendants remain in contempt, and the litigation, though eventful, has eluded resolution. Specifically, our earlier opinion was followed in the superior court by proceedings initiated by the town to attach and execute upon Bonser's bail money to secure payment of accrued monetary penalties, and by Bonser's motion to stay his surrender for reincarceration, his motion for new trial, motion for declaratory judgement, motion for dissolution of the original injunction, and motion for reconsideration of the superior court's various orders in response to preceding motions. Two further notices of appeal filed in this court resulted in affirmances of various trial court rulings rendered by Temple, J., Gray,

J., and Nadeau, J. See unpublished orders dated May 24, 1985, in No. 85-075 and August 8, 1985, in No. 85-213, the former explaining at some length Bonser's attempts to relitigate the merits of his various claims were barred by his failures to appeal rulings when he had had the opportunity to do so. Although the defendants were represented by a lawyer for at least some of the time consumed by these proceedings, our own files show that during this period Bonser was again represented by lay counsel in the person of his son, who appeared for him and communicated on his behald as an "associate member" of the "New Hampshire Civil Rights Association," see State v. Settle, 129 N.H. 171, 174, 523 A.2d 124, 126 (1987), using stationery bearing the name of Joseph S. Haas as an officer of the association, see generally State (Haas Complainant) v. Rollins, 129 N.H. 684, 533 A.2d 331 (1987).

In the meantime, on March 1, 1985, Bonser had been remanded to the custody of the sheriff for further commitment as a result of the continuing civil contempt. Nadeau, J., reviewed the commitment in April and thereafter issued several order for Bonser's temporary release to explore possibilities of compromise with the town selectmen. No compromise was reache, but at a hearing on May 23, 1985, Nadeau, J., issued the following new order sua sponte:

> "[Bonser] is to be released from custody [in the Rockingham County House of Correction], forgiven all monetary penalties to date, and purged of contempt upon certification in writing, under oath,...within 30 days...that he has done one of the following:
>
> 1. Made official application, without

equivocation, to the appropriate agencies of the Town of Nottingham, for all permits and approvals required by existing ordinances to allow the location of mobile homes on the defendants' land, or

2. Caused to be removed from the land all mobile homes for which he possesses no such permits and approvals, or

3. Paid to the Town of Nottingham the sum of $38,550. representing civil monetary penalties from November 26, 1982, to date.

If the defendant decides to act under Section 1 of this paragraph, he must pursue diligently, and complete the official application process and conform to all existing laws and ordinances governing the location of mobile homes on his land."

The judge explained from the bench that "[b]y virtue of this order, Robert Bonser receives one last chance to absolve him self of all contempt charges and financial loss by applying fro the permits or removing the mobile homes."

Each party filed exceptions to the order, but on May 28, 1985, Bonser's son filed a written notice that his father would avail himself of the first option, a decision that Bonser confirmed by letter of that date to town counsel, in which he stated that

> "I give you my word that I will pursue the applications dilligently [sic] and complete the official application process and conform to all existing laws and ordinances governing the location of mobile homes on my land, pursuant to the ...Court's order....."

Only the town objected to the order strongly

enough to bring an appeal, which we declined to accept on October 3, 1985. See No. 85-279.

Bonser's release from confinement on May 23 was followed by two developments that have led to the appeal now before us. The first began with the town's motion on June 3, 1985, seeking an award against the defendants of $25,000. in attorney's fees. Nadeau, J., deferred action on this until "expiration of appeal period or final judegment follwoing decision of the New Hampshire Supreme Court," which language apparently referred to possible appeals from the May 23 order. On December 10, 1985, Nadeau, J.,found that the defendant's refusal to comply with the June 10, 1982 orders had been "obstinate, vexatious and oppresive," and he awarded fees of $13,873.40 with respect to the period August 12, 1982, through November 27, 1985. Although both

defendants appealed that award, the corporation defaulted by failing to appear through counsel licensed to practice law, see State v. Settle, supra at 173, 523 A.2d at 125-26, and it is only Bonser's challenge that is before us now.

The second line of development under the rubric of Bonser's efforts to "complete the official application process and conform to all existing laws and ordinances governing the location of mobile homes on [the] land." The first such effort actually came from the town, when its counsel wrote to Bonser on June 14, 1985, enclosing copies of the zoning ordinance, building code, and subdivision rules, and application forms for building permits, subdivision approval and a special exception from zoning requirements to allow open space development. The selectmen met with Bonser on Jul 9 to help him

complete the applications, and the town's lawyer wrote again on JUly 22 to remind him that he had not as yet submitted anything.

On July 29 Bonser filed applications for nine building permits, "signed under compulsion of court order," and an application for special exception, "signed under compulsion of court." This application, however, failed to include required frontage and lot line measurements for the property involved, and made no required reference to the provision of the zoning ordinance on which the application was based, instead claiming only a constitutional entitlement to continue to use the land for a mobile home park. Finally, Bonser submitted a subdivision application, also "signed under compulsion of court order," in which he failed to identify the land, as requested, either by "Tax Plan No." or "Lot No.," and

to which he failed to attach, as requested, either a title opinion "from a duly licensed attorney as to the existence or non-existence of any encumbrances" or a "preliminary lay-out." Bonser claimed that such a layout was "already on file with the town and [county registry] of deeds."

Counsel for the town advised Bonser by letter on August 13 that the applications were incomplete. Bonser replied on September 14 that his health then prevented him from attending to such matters. After Bonser had been observed as a spectator at several judicial proceedings in October and November, however, having done nothing more to complete the application, the town moved on December 2, 1985, for a further finding of contempt.

After the superior court had scheduled the motion for hearing, Bonser submitted an "open letter" to the town, its counsel and

the superior court, again raising his objections to zoning and repeating his claim of entitlement to jury trial in the town's equity proceeding for enforcement of the local ordinances. With the copy of the letter sent to town counsel, Bonser enclosed, inter alia, copies of septic sytem plans for seven of the nime lots, a commercial well water analysis of a sample "brought in by: Cedar Waters Village, Inc.," and three surveyor's plans, only one of which identified the surveyor who had prepared the plan, and none of which bore a surveyor's seal. One plan showed an outline of the Cedar Waters tract, one showed a portion of that outline consisting of some unmeassured road frontage and four boundary courses, and one showed lot lines for "Cedar Waters Village." The last plan was given no location by reference to the entire tract shown in the first plan, and showed two seperate

series of lots consecutively numbered 7, 9, 11, 13.

Town counsel forwarded the material to the planning board and asked the court to defer action on the motion for further contempt until after a planning board meeting scheduled to review Bonser's application. The court granted the continuance. Counsel also wrote to Bonser notifying him of the scheduled planning board meeting, advising him that under the subdivision regulation both preliminary and final plans must bear the seal of a registered land surveyor, and requesting Bonser's representation at the meeting either personally or by a registered surveyor.

On the same day that counsel wrote to Bonser, the latter issued an "objection to jurisdiction (by feudal tenure) of property of declarant, by city/town agents or agencies

under 'color of law' and 'affidavit of declaration of rights.'" This document appeared to be directed to the "Planning/Zoning/ Selectmen/etc. [of] Nottingham[,] N.H." and conclided with the demand that "said agency shal 'cease and desist' from any further harassment of the declarant, and his fundamental rights of all property herein, and the 'liberty' to use the same."

Neither Bonser nor a surveyor appeared at the scheduled planning board meeting on January 22, 1986. The transcript of that hearing indicates thatthe board members could not identify the exact location ofthe lots for which Bonser sought subdivision approval by reference to the applications and plans submitted. When a board member asked whether Bonser had sent a representative, one John Settle responded, see State v. Settel, 129 N.H. 171, 523 A.2d 124, who

described himself as vice-president of the corporation authorized only to "get...what you need in a list form to further these papers." Settle was referred to a checklist of required material, contained in the most recently amended planning board regulations, and he was expressly advised of the requirement that plans be prepared and stamped by a registered land surveyor. The chairperson of the board specifically cited Settle to the statement of that requirement in §V, A., 1., as contained in both the subdivision regulations as amended March of 1975 (the Regulations) and a later version as amended in November of 1985 (the Amended Regulations). The chairperson advised Settle that it probably would be easiest for everyone if a surveyor followed the checklist and prepared the further materials for submission. She said she would be willing to talk with the surveyor, as would the town

road agent.

Bonser's response came in a letter to the planning board, on stationary of Cedar Waters Village headed by the motto, "Grin & Bare It." He stated that the copies he enclosed of "certain Registered Land Surveyor's drawings" would "negate the need for a Surveyor [sic] to meet with you personally." After protesting that the town subdivision regulations had no application to "rental property" and threatening further litigation if his applications were disapproved, he concluded that "if there is anything further you require in the way of paperwork, I really must insist that you describe it specifically and in detail in a letter...." The material Bonser enclosed consisted of copies of certificates of the State Water Supply and Pollution Control Commission approving septic systems for five of the

nine lots for which he had sought building permits, together with copies of a small plan showing a portion of the boundary of Cedar Waters land, a correction to another plan, and a small fragment of a third plan, showing a surveyor's seal at its corner.

The chairperson of the planning board wrote to Bonser on February 27, 1986, stating that the applications were still incomplete. She explained that the board could not very readily process applications by mail and asked for some personal contact with a representative of the corporation. She notified Bonser of a further meeting set for March 26 and suggested that a surveyor communicate with her before that meeting to "discuss detailes of the necessary submissions."

No one attended the meeting on the corporation's behalf, and the defendant's

only subsequent communication with the chairperson was a letter from Bonser, received two days after the meeting, advising that he would not attend because he did "not recognize the planning board as having any authority to violate [his] Constitutional Rights." He claimed that he had supplied all that the town "could logically need," he stated that anything Mr. Settle had said "means nothing," and he enclosed copies of the State and National Constitutions.

The town then requested a hearing on its pending motion for further contempt, which was held on May 16, 1986. On May 21, Nadeau, J., made the following findings and order:

> "I find from the evidence produced at the last hearing, that the Defendants have not pursued diligently and comp-

letely the official application process, nor have they conformed to all existing laws and ordinances governing the location of mobile homes on the land in question. I find specifically:

1. The Defendants failed to appear at Planning Board Meetings and present and discuss their proposals.
2. The Defendants failed to provide current engineering plans showing the specific locations of mobile homes, septic systems and other land characteristics.
3. They failed to complete the application process.
4. They have engaged in conduct designed to confuse and delay consideration and action by the Planning Board.

....

I find the Defendant's conduct to be in contempt of prior Court orders and,

specifically, in contempt of the Court order dated May 23rd, 1985 and accordingly enter the following order:

1. Within seven (7) days of the date of this order, the Defendants shall remove from their property the mobile homes in question.
2. I find the previous civil penalties imposed in the past have been ineffective to achieve compliance with the law and Court orders; and for that reason, after seven (7) days from the date of this order, a civil penalty of $1,000.00 per day is assessed against the Defendants, jointly, for each day any such mobile home remains on the property.
3. If after seven (7) days from the date of this order, the Defendants have failed to remove all mobile homes, the Town is authorized to

take whatever steps are reasonably necessary to begin and complete removal of the mobile homes, including any reasonable force required. All costs of the removal shall be assessed against the Defendants.

....

5. After removal of all mobile homes in question, the Town shall certify to the Court, in affidavit form, the civil penalties which accrued under Paragraph No. 1 of this order and the costs which were incurred under Paragraphs No. 2 and No. 3. Upon approval of those amounts by the Court, the Clerk of the Rockingham County Superior Court shall forthwith enter civil judgement against the Defendants in favor of the Town of Nottingham and , at the request of the Town, shall forth-

with issue an execution.

> The Court will not entertain any motions for reconsideration, modification or stay of this order unless both parties join in the request or unless directed by the New Hampshire Supreme Court. The time limit set forth in this order will not be interrupted by the filing of an appeal, pleading, motion or document, or other paper by either party except by order of the New Hampshire Supreme Court."

The defendants' appeal of this order has been consolidated with Bonser's appeal of the preceding award of counsel fees.

Although the notice of this second appeal was filed in June, 1986, some twenty-two months were to elapse before this court issued a final order scheduling briefing

and argument of the two appeals as consolidated. The time was consumed by collateral proceedings involving three issues: the right to lay counsel to represent the corporation; the propriety of defaulting the defendants for failure to pay costs of transcript preparation within the time allowed; and Bonser's demand for the retroactive recusal of Nadeau, J., which would have the effect of vacating the two orders under appeal. Despite reluctance to extend this already lengthy procedural history, we render some account of these matters, given the potential consequences to the defendant of the contempt that continued while the issues were resolved.

We have referrred before to State v. Settle, 129 N.H. 171, 523 A.2d 124, which concerned the proclivity of its named defendant to practice law without a license. It

was in part because of Settle's appearence on behalf of the corporate defendant in the case now before us that the State, in effect, moved to appeal a superior court order allowing Settle to represent a corporation of which he was an officer or director. Id. at 173, 523 A.2d at 125. In view of the number of Settle's appearences for such corporations, we accepted the appeal and stayed the processing of other appeals in which Settle had thus appeared as lay counsel. Our orders staying action in the two appeals now before us, however, expressly provided that we did not stay enforcement of the superior court orders under appeal. The contempt, if contempt it was, therefore continued in the interim subject to the civil sanctions ordered by the trial court. Despite this fact, the corporation did not see fit to substitute counsel in order to avoid the delay, and the present appeals

rested until the decision in State v. Settle supra eight months later, in March, 1987, at which time Settle's appearences for the corporation were stricken in accordance with our opinion.

As we indicated above, the corporation then failed to procure new counsel within the time allowed in the appeal from the counsel fee award. The failure to do so resulted in default as against the corporation, but the two appeals otherwise went forward, until the following July.

In July, 1987, the records of this court indicated that the defendants had failed to advance the estimated cost of transcript preparation in the appeal from the contempt finding of May 21, 1986, and an order was accordingly issued deeming the appeal to be waived. This was followed by a motion to reconsider on the ground that the

defendants had never received notice of our prior order requiring payment for transcript preparation. Since this motion turned on a factual issue, we referred it to Bois, J., as a special master, for evidentiary hearing and recommendation.

In October, 1987, before any hearing had been held, Bonser filed an original motion in this court seeking summary reversal of all orders previously issued by Nadeau, J., on the ground that the judge should have recused himself because of a conflict of interest derived from his uncle's position as an officer of the corporation and its counsel. Factual issues thus raised were also referred to Bois, J.

In February, 1988, Justice Bois reported findings to the court, on the basis of which we reinstated the appeal from the contempt finding of May 21, 1986, but refused

to require the recusal of Nadeau, J., with respect to any period prior to Bonser's first request to that effect. See unpublished order in No. 86-005 and No. 86-255 (when party knowing of grounds for judge's disqualification delays in filing request therefor, recusal need not be granted as to period prior to request).

After preparation of the transcript, briefing orders were issued, and the consolidated appeals were argued in September, 1988. We begin our consideration of them with the appeal from the fee award.

Bonser claims the award of attorney's fees is inconsistent with the court's order of May 23, 1985, affording the defendants a final opportunity to purge themselves of contempt, as well as erroneous under the general standard governing such fee awards. With respect to the May 23 order, the town

and the trial court have taken the position that the "monetary penalties" from which the defendants were offered forgivness did not include counsel fees, so that the court was entirley free to entertain the town's motion for such fees filed only two days after Bonser had indicated he would accept the court's offer of release from jail upon undertaking to comply with the town's ordinances and regulations.

The town's position might be at least an arguable one, were it not for the court's further statement delivered with the May 23. order, that by "virtue of this order, Robert Bonser receives one last chance to absolve himself of all contempt charges and financial loss...." "[a]ll...financial loss" is an unequivocal phrase, and absolution from all financial loss is not reconcilable with a requirement to pay thirteen thousand dollars in counsel fees. The only reasonable

reading of the order as a whole, therefore, supports Bonser's position that if he has purged himself of contempt by satisfying the terms of the May 23 order he should be free of any award of counsel fees. Conversely, of course, if the trial court correctly found that Bonser failed in his undertaking to honor the terms of the May 23 order, there is no bar to the fee award.

The same may be said on considering the propriety of the fee award under the general standard expressed in Harkeem v. Adams, 117 N.H. 687, 377 A.2d 617 (1977), and its progeny. On the assumption that the trial court was correct in subsequently finding that on the date of the fee award Bonser had failed to purge himself of contempt, the propriety of the award under the general standard is too obvious to require extended discussion. Over ten years

ago this court clearly enunciated the rule that a court of equity can require a party to pay his opponent's counsel fees when he has prolonged litigation "through bad faith or obstinate, unjust, vexatious, wanton or oppresive conduct," Id. at 688, 377 A.2d at 617. That rule was explained and affirmed in Indian Head National Bank v. Corey, 129 N.H. 83, 523 A.2d 70 (1986), and was most recently generalized in Keene v. Fearon, 130 N.H. 494, 501-02, 543 A.2d 1379, 1383-84 (1988), where we explained that a constitutionally created court in this state is empowered to award fees "in any action commenced, prolonged, required or defended without any reasonable basis in the facts provable by evidence, or any reasonable claim in the law as it is, or as it might arguably be held to be." Id, at 502, 543 A.2d at 1383.

As our statement of facts indicates, the record shows that Bonser has persisted in a course of contumacious action, as unreasonable in law as it has been in fact, that began on the date of the superior court's original injunction in June of 1982. As of the date of the fee award, Bonser had persistently refused to comply with the order, and for three and one-half years he had repeatedly attempted to relitigate what he had consistently failed to appeal. There is therefore no question about the appropriateness of awarding fees as equitable compensation, provided that the trial court rightly found that Bonser remained in contempt through the period covered by the fee award.

We therefore turn now to that central issue and explain why we affirm the trial court's finding that the defendants continued

to maintain their contemptuous posture. The first option listed in the order of May 23 was conditioned on Bonser's application to the appropriate town agencies for "all permits and approvals required by existing ordinances to allow the location of mobile homes on the defendants' land...." The trial court made it plain that "[i]f the defend t decides to...[make the appropriate applications], he must pursue it diligently, and complete the official application process...." In its findings of May 21, 1986, the court found inter alia, that the defendants had never completed the application process, in that they "failed to provide current engineering plans showing the specific locations of mobile homes, septic systems and other land characteristics." The record supports these findings.

The town's subdivision regulations, as

in effect throughout this litigation, define a "subdivision"for which the planning board's approval must be obtained as "the division of a ...tract...of land into two or more lots...for the purpose...of sale or of building development." Regulations §II,D.; Amended Regulations §II,D. (The latter regulation further provides expressly for its application to rental property, a conclusion reached by the trial court prior to the amendment as the basis for the original injunction of June 10, 1982.) For the subdivision consisting of the lots to be leased for building development in the form of mobile homes, the defendants were obligated to apply for approval by submitting a "preliminary plat" drawn to scale, Regulations §V,A.; Amended Regulations §V,A., bearing a survey date and stamp or seal of a registered New Hampshire land surveyor, Regulations §V,A.1.; Amended Regulations §V,A.1., and

showing, inter alia, contour lines, Regulations §V,A.3.; Amended Regulations §V,A.3., and proposed facilities for sewage disposal, Regulations §V,A.5.; Amended Regulations §V,A.7.

The evidence indicates that none of these requirements was satisfied. There was no single preliminary plat, and the scales on the various plans submitted varies from one-inch-to-one hundred feet to one-inch-to-four hundred. The only plans bearing a New Hampshire surveyor's stamp were two purported corrections of an earlier survey, each showing only a fraction of the tract's perimeter. Although separate plans of septic systems showed contour lines, they were prepared by Bonser's son, who is not a surveyor. Moreover, these plans related to only seven lots, whereas one large plan showed seventeen lots and the evidence indicated that

nine lots were actually occupied.

While this recitation hardly exhausts the application's deficiencies, the evidence described is enough to support the trial court's finding that the defendants failed to complete the application process, and our earlier description of the communications between Bonser and the town officers confirms the court's basis for a finding that the defendants' conduct was designed to confuse and delay the consideration of their application. We can tell from our own appellate review of the record just how confusing many of the submitted items are, and how time-consuming it must have been for the board to try and piece them together, once the town's repeated reminders and its motion for further contempt had succeeded in goading Bonser into taking some action.

Indeed, on the subject of confusing

and dilatory conduct it is remarkable that Bonser refused all requests either to meet personally with the board, or to send a representative to help the board try to make sense of the materials submitted and to discuss their deficiencies as the board saw them. Bonser's explanation is that any requirement for an applicant to be represented personally at planning board meeting was unenforceable against him. He points to the fact that it was only in November, 1985, that the Regulations were amended to require personal representation at board meetings, see Amended Regulations §III, whereas the order of May 23, 1985, conditioned purgation of contempt on "application...for all permits and approvals required by existing ordinances," which Bonser takes to mean existing on the date of the order.

Bonser's position reflects a total misreading of the May 23 order, however. The

phrase "required by existing ordinances" modiifies "permits and approvals." It makes no reference to the procedure required to apply for those permits and approvals. Hence, even if "existing" had reference to the order's date of May 23, it would not purport to excuse Bonser from compliance with procedural requirements added to the planning board's regulations and made effective after that date. Conversely, even if the phrase "required by existing ordinances" did refer to procedural requirements, "existing" would most reasonably be read to refer to ordinances existing at the time of application approval, not existing on May 23. Citizens have no general right to the continuance even of prior substantive law, Farnum's Petition, 51 N.H. 376, 381 (1871), and nothing short of substantially detrimental reliance on the prior state of land use regulations will exempt a private party from

burdens imposed by their subsequent amendment. See Socha v. City of Manchester, 126 N.H. 289, 291, 490 A.2d 794, 795 (1985); RSA 674:39. This law stands in stark contrast to Bonser's position, which seems to be that consistent defiance of an ordinance should establish a right to rely upon its term as against all subsequent amendments.

Little more need be said to dispose of Bonser's remaining attempts to avoid the latest finding of contempt. First, he condems the town for seeking equity with hands that are said to be rendered "unclean" by the town's failure to respond to his demand for a letter, specifying every detail in which the planning board claimed the applications were deficient. But Bonser points to no provision of the board's regulations requiring such a written bill of particulars, and in stressing his demand for written specification he of course ignores the board's

repeated requests for a meeting with him or his representative, to discuss exactly what was missing from the application. Far from suffering from any unclean hands, the board, along with other town officials and town counsel, exhibited a degree of patience in dealing with Bonser that we can only admire.

Next, Bonser attacks the validity of the order of May 16, 1986, finding him in contempt, because of Justice Nadeau's express refusal to entertain any motion for rehearing on the matters addressed, unless sought by both parties or mandated by this court. This provision in no way taints the order, however. The superior court's consideration of rehearing motions is not mandated, but is discretionary with the court, Redlon Co. V. Corporation, 91 N.H. 502, 505, 23 A.2d 370, 373 (1941). See Super. Ct. R. 59-A (effective September 1, 1987); but cf. RSA

541:5 (action mandatory on rehearing motion filed as prerequisite to appeal from administrative agency). We perceive no abuse of discretion in this instance. Bonser's policy of seeking continual reexamination of issues previously decided, resulting in what our earlier opinion described aa an avalanche of paper, surely justified the trial court in finding it overwhelmingly probable that a request for rehearing would simply be one more pointless strain on the system.

Nor do we find support for Bonser's position in the two State cases he cites, State v. Chaisson, 123 N.H. 17, 30, 458, A.2d 95, 102 (1983); State v. Settle, 123 N.H. 34, 37, 455 A.2d 1031, 1033 (1983), which hold merely that a trial court may not adopt a blanket policy of refusing to rule on the merits of an evidentiary issue subject to discretionary judgment. Logan v.

Zimmerman Brush Co., 455 U.S. 422 (1982), which he also cites, is likewise beside the point. That case held that due process barred a State from terminating a cause of action without hearing, simply because a State official, not a party to the action, had failed to satisfy some mandatory step in the statutory appeal procedure. The court adverted to the related rule of due process preventing a State "from denying potential litigants use of established adjudicatory procedures, when such action would be 'the equivalent of denying them an opportunity to be heard on their claimed right[s].'" Id. at 429-30 (quoting Bodie v. Connecticut, 401 U.S. 371, 380 (1971)). Here, Bonser was given a full hearing; he was simply denied a wholly discretionary opportunity for rehearing, because of his repeated abuses of the adjudicatory process.

Nor is there any basis for Bonser to raise the judge's refusal to entertain any rehearing motion as a ground for demanding the judge's recusal from the case. Bonser made no such demand in the trial court in repsonse to the May 21, 1986 order, see Daboul v. Town of Hampton, 124 N.H. 307, 471 A.2d 1148 (1983) (no appellate consideration unless issue raised below), and we have already noted that his later motion for recusal of Nadeau, J., was the subject of our prior ruling, which did not require the judge's recusal as of May 16, 1986. There being no error of law or abuse of discretion in the order limiting the opportunity for rehearing, see Dobson v. Staples, 123 N.H. 102, 103 456 A.2d 972 (1983), it is no predicate for relief.

Ironically, the remaining issues that Bonser seeks to raise here provides the occasion for a paradigm example of just the

sort of abuse of judicial process that led Nadeau, J., to bar rehearing except on the parties' joint motion. Bonser asks for reversal of the contempt findings on the grounds (a) that the zoning ordinance is unconstitutional in providing the same lot size requirement for mobile homes as for other dwellings and in barring mobile home parks as such; and (b) that the defendants' use of their property is exempt from the subdivision requirements either as "rental" property or as "grandfathered" land use. In asserting these positions, however, Bonser once again refuses to accept the determination of this court over four years ago, that review of a contempt finding does not entitle him to make a non-jurisdictional collateral attack on the original order, as to which he stands in contempt. Bonser, 124 N.H. at 810, 481 A.2d at 532. He simply will not face the fact that the period for

appealing the order of June 10, 1982, is over.

It is over, however. The 1982 order stands, as does the 1986 finding of contempt and the 1985 award of attorney's fees. Unfortunately, the condition of stalemate still remains, as well, and on remand of this case to the trial court every effort must be made to end the litigation.

It is clear, of course, that no court will ever convince Bonser of his errors in believing that the State and National Constitutions provide, or should be interpreted to provide, opportunities for jury trials in equitable enforcement proceedings and in adjudications of civil contempt. It is no more likely that he will ever accept zoning regulation as constitutional, or voluntarily comply with the existing court order. In the absence of some fresh approach to the problem

of compliance, therefore, the future will probably hold nothing more than further cause for Bonser's incarceration and mounting fines for contempt, until the economic value of the land in question has been entirely exhausted (assuming it is not exhausted already) and a sale of the entire tract is requested to pay the accumulated fines.

Although we can understand why the town might prefer to let that happen, it is not the proper business of municipalities to profit from violations of their land use regulations, or the proper business of the judiciary to allow them to do so, if there is any reasonable way to end the violation giving rise to the fines. For that matter, the judicial system has a vital interest in bringing such violations to speedy conclusions, as this case illustrates appallingly

well. The amount of judicial time expended thus far without eliminating a scintilla of the underlying violation is now beyond calculation.

It does not appear, however, that the town and the judiciary are subject to the defendentis option to continue the stalemate. On four occasions the superior court has issued orders authorizing the town to enter the property and remove the mobile homes at the defendants' expense, and thus to bring the violtions to an end. In the first and second instances, under the orders of JUne, 1982, and February, 1983, the town took no action. Under the third order, of May 23, 1985, which would have required the town to act by a time certain, the town's authority was preempted by Bonser's undertaking to make the applications he had previously refused to file. At the present

time a fourth order, of May 21 1986, again authorizes the town to act, but without imposing any obligation that it do so. The time has surely come, however, to impose such an obligation.

On remand, therefore, the superior court should not confine its attention solely to the imposition of further penalties for contempt and enforcement of the penalties that have accrued. The court should also forthwith issue notice to the parties, and to third parties with interests in the mobile homes, to appear for hearing to determine when and under what conditions the town will be required to enter the property to remove the mobile homes at the defendants' expense, failing which the original order of June 10, 1982, will be vacated.

Affirmed and remanded.

All concurred.